No. 83-724

In The

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III, AND GEORGE A. BECK,

Appellants

v.

THE UNITED STATES JAYCEES,

Respondent

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE WOMEN'S ISSUES NETWORK, INC., BUSINESS AND PROFESSIONAL WOMEN'S CLUB OF DALLAS, INC., NATIONAL COUNCIL OF JEWISH WOMEN — GREATER DALLAS SECTION, SOUTHERN METHODIST UNIVERSITY ASSOCIATION OF WOMEN LAW STUDENTS, STATE BAR OF TEXAS WOMEN AND THE LAW SECTION, WOMEN'S CENTER OF DALLAS, AS AMICI CURIAE IN SUPPORT OF REVERSAL

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Amici respectfully submit this brief in support of appellants.

INTEREST OF AMICI

The Women's Issues Network is an association that encourages and supports individuals and organizations in the Dallas area in particular and in Texas in general to advocate equal opportunity and advancement for women. The members of the Network respresent several dozen organizations, each of which seeks to promote human dignity. The Network

coordinated the filing of this brief, as well as a brief in *Hishon v. King & Spalding*, No. 82-940.

The Business and Professional Women's Club of Dallas, Inc. is a not-for-profit corporation that promotes the interests and economic self-sufficiency of business and professional women by seeking elimination of restrictive and discriminatory work laws and the adoption of equitable terms and conditions of employment. The club presents programs and seminars, acts to influence legislation, and provides a network for women.

The National Council of Jewish Women, Greater Dallas Section, is an association that, in the spirit of Judaism, is dedicated to furthering freedom and welfare in the Jewish and general communities. The members of the Council provide essential social services and present educational programs to the community. The promotion of equal opportunity for employment and advancement is one of the Council's priorities.

The State Bar of Texas Women and the Law Section and the Southern Methodist University Association of Women Law Students are each associations of lawyers or law students that seek to encourage women to study and practice law, expand employment opportunities for women lawyers, remove barriers to effective participation by women lawyers in the bar, and inform the bar and public of issues affecting women and women lawyers. Each association regularly presents public programs and seminars, acts to influence legislation, and provides women lawyers and law students a network. The law students' association in 1975 through 1980 sued four Dallas law firms, in which suits it asserted that the firms' employment practices violated Title VII of the Civil Rights Act of 1964.

The Women's Center of Dallas is a not-for-profit corporation that seeks to change society's expectations of women through research, education, counseling and communication. Past activities of the Center include employment counseling, teaching entry skills, providing a job bank and promoting job sharing.

SUMMARY OF ARGUMENT

The Jaycees present two different kinds of associational claims, an associational speech claim and an associational privacy claim.

The speech claim — that the admission of women will affect the positions the Jaycees take on public issues — is insubstantial because there was no record showing that women Jaycees will differ from men Jaycees on the issues. The assumption that there is a difference is a stereotypical view of women who, like the men Jaycees, are in middle- and upper-management. If the Jaycees' positions include the inequality of men and women, which we believe has not been asserted, a *practice* of sexual discrimination in furtherance of that position may be prohibited by reasonable legislation in furtherance of legitimate state interests. See *Runyon v. McCrary*, 427 U.S. 160 (1976). Indeed, prohibiting the practice of sexual discrimination is not only a legitimate state interest, it is a compelling state interest. See *Bob Jones University v. United States*, 103 S.Ct. 2017 (1983).

The privacy claim — that the admission of women will prevent men from choosing to have a relationship with men only — does not deserve special protection. The Jaycees are not an intimate association. To the contrary, they actively pursue participation and influence in the community and its

affairs. State and federal law have traditionally regulated such public associations in the public interest.

ARGUMENT

I. THE RIGHT OF ASSOCIATION IS NOT UNITARY; ASSOCIATION WITH MEN ONLY IN ORDER TO ADVOCATE THE "BROTHERHOOD OF MAN" IMPLICATES SPEECH, WHILE ASSOCIATION WITH MEN ONLY IN ORDER TO ASSOCIATE WITH MEN ONLY IMPLICATES PRIVACY.

Too often in constitutional litigation and adjudication it is forgotten that "association" appears neither in the text of the Fourteenth Amendment nor in the text of the Bill of Rights. Rather, the right of association is "an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Of course, all other rights protected by the Due Process Clause have the same open-textured, textual source. But most of them do appear explicitly in the text of the Bill of Rights. Regardless of whether such Fourteenth Amendment rights are greater or lesser than, or equal to, their cognate, explicit rights, see *Adamson v. California*, 332 U.S. 46, (1947); *Duncan v. Louisiana*, 391 U.S. 145 (1968), these Fourteenth Amendment rights have at least some obvious starting-places for their sources and principles.[1] This is not the case for "association."

Amici respectfully submit that "association," as an aspect of "liberty," is not unitary in source or principle. Rather, we

[1] This is not to say that text is the sole source for constitutional adjudication, even where text is not open-textured. See *Katz v. United States*, 389 U.S. 347 (1967) (Fourth Amendment "privacy"). Rather, text is the starting-place. See n.2 *infra*.

submit, "association" has an advocacy of ideas or speech aspect, and it also has a privacy of relationship aspect. The advocacy of ideas or speech aspect has of course a plain, but not sole, source in the text of the First Amendment. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); cf. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) ("assembly"). The privacy of relationship aspect has an implicit or penumbral source in the text of several Amendments, as well as elsewhere. See *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (Powell, J.).[3]

Distinguishing the several aspects of "association" clarifies the results in this Court's adjudication of association claims. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court considered several claims made by whites that they had a right not to admit black children to a private school. The Court considered the claims as associational, parental, and privacy, although it plainly was uncomfortable in doing so. See *id.* at 178 and n.15. Put as we have submitted above, however, the claims were two different kinds of associational claims — a speech claim that whites had a right to operate a school where they taught their children the doctrine of white racial

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[3]Moreover, each of the relationships in these decisions is somewhat different from the others; each has somewhat different sources and principles. We emphasize these differences not because we are either surprised or troubled by them; we emphasize them to make sure that different associational claims are considered differently.

We support each of the associational relationships described in the referenced decisions. We agree with the Court's use of nontextual sources to protect personal liberty. Chief Justice Marshall's statement "that it is a constitution we are expounding," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (original emphasis), was meant to capture the Court's understanding that the Constitution is not a legal code but rather an instrument setting out "only its great outlines." *Id.*

supremacy, and a privacy claim that whites had a right to operate a school where they precluded their children from having relationships with black children.

In *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), the Court considered claims by employees that they had a right not to join a union shop. Put as we have submitted, the claims were two associational claims — a privacy claim that employees had a right not to have a relationship with a union, and a speech claim that employees had a right not to support union "ideology" with which they disagreed. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Amici submit that, similarly, there are two associational claims made by the association here. One claim is to associate with men only because men support the association's public positions, a claim that implicates speech. The other is a claim to associate with men only in order to have a relationship with men only, a claim that implicates privacy. By failing to distinguish the claims, the court of appeals failed both to frame the issues clearly and to rely upon the appropriate case law.[5]

II. THERE WAS NO RECORD SHOWING THAT THE ADMISSION OF WOMEN WILL AFFECT THE ASSOCIATION'S POSITION ON ANY PUBLIC ISSUE.

Because an association takes stands on public issues, it does not follow that each of the association's practices is

[5] This Court has at least two other cases in which associational claims are being made. *Hishon v. King & Spalding*, No. 82-940; and *Minnesota State Board for Community Colleges v. Knight*, Nos. 82-968, 82-977. We submit that analysis in those cases would be aided by distinguishing the associational speech claims from the associational privacy claims. As *amici* in *Hishon* also, we respectfully submit that there is no substantial associational speech claim in that case.

specially protected by the First Amendment.[2] Were this not so, then every club in a "dry area" of Texas need only take a position in the Presidential campaign in order to raise a substantial defense to suit under a public accommodations statute. Rather, an association's practice is examined as conduct is traditionally examined under the First Amendment, that is, to determine whether government regulation of the conduct significantly burdens First Amendment speech and, if it does, whether the government regulation satisfies the scrutiny accorded to such speech-related conduct. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-63 (1958); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 130-31 (1981) (Powell, J., dissenting).[3]

Amici submit that there is no showing in the record that Minnesota's regulation of admission to the Jaycees would in any manner, let alone in any significant manner, burden First Amendment speech. See *id.* at 122. While politicians and the media may speculate, as did the court of appeals, that the admission of women into an association may affect the positions the association takes on issues, 709 F.2d at 1576 ("[t]he regulation ... has the potential of changing [the] content of what the Jaycees are saying..."), plainly there is nothing in the record showing that the women who would join the Jaycees would take positions different from men on such recent Jaycee issues as the President's economic policies or this Court's appellate jurisdiction, or

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[2] Since so much of this Court's decisional law assumes that the First Amendment embraces the entire speech aspect of Fourteenth Amendment "liberty," we shall use "First Amendment" when referring to Fourteenth Amendment speech.

[3] The majority in *Democratic Party* endorsed the traditional analysis because of the nature of the national political parties.

would disagree with men on such elements of the Jaycee creed as "faith in God," "free enterprise" and the transcendency of "the brotherhood of man" over "the sovereignty of nations." *Id.* at 1570. While there are some differences between men and women that do not require a record showing, see *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (Rehnquist, J.); *id.* at 479 (Stewart, J., concurring); *id.* at 481-82 (Blackmun, J., concurring in judgment), plainly it is not apparent that with regard to the above positions there are differences between the men and women who would join the Jaycees. Cf. *Craig v. Boren*, 429 U.S. 190, 200-01 (1975) (rejecting statistical proof).

What the court of appeals did was to stereotype men and women with regard to their positions on issues. It assumed that the typical upper- and middle-management man who joins the Jaycees, 709 F.2d at 1572, will be different from a similarly-situated woman. Such stereotypical assumptions about men and women, particularly men and women in the business world, are anathema to clear thinking and help maintain barriers to women's entry into business and the professions. They do not belong in constitutional adjudication.

III. IF SEXUAL INEQUALITY IS A POSITION OF THE ASSOCIATION, A PRACTICE OF SEXUAL DISCRIMINATION IN FURTHERANCE OF THAT POSITION IS NOT PROTECTED SPEECH.

If it is asserted — and we do not believe it has been — that the Jaycees' positions include the dominance of men over women, cf. 709 F.2d at 1570 ("the brotherhood of man," not people), or a preference for men over women in leadership positions, then government regulation of admission to membership does significantly burden associational speech. Moreover, such advocacy of male supremacy could not be

prohibited, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969), although this Court has given decidedly less protection to content not at the core of First Amendment values. See *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980) (commercial speech); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (Stevens, J.) (offensive words); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

Nonetheless, the *practice* of male supremacy, as opposed to the advocacy of male supremacy, is not entitled to special First Amendment protection. While this Court was divided on the statutory issue, no member of the Court dissented from the constitutional holding in *Runyon v. McCrary*, 427 U.S. 160 (1976); see *id.* at 192 n.2 (White, J., dissenting). For the Court, Justice Stewart stated that there is a difference betwen advocacy and practice of racial segregation, and he reaffirmed the holding in *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), that while " '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection.' " 427 U.S. at 176.

The correctness of the holding is plain. The case law has always assumed that government could regulate or prohibit much conduct — e.g., sabotage, assault, trespass — the advocacy of which it could not punish. Government can punish such conduct even though the conduct enhances and vindicates speech. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912-20 (1982).

Where advocacy is of sexual inequality and sexual discrimination is in furtherance thereof, government prohibition of such conduct is subject to deferential judicial scrutiny; Minnesota has plainly satisfied such scrutiny in this case. Even were scrutiny somewhat higher, Minnesota would nonetheless satisfy such scrutiny. See *Bob Jones University v. United States*, 103 S.Ct. 2017, 2029-31 (1983).

The entry of women into business and the professions is a compelling interest of government. Many associations and clubs here in Texas, as well as elsewhere in the nation, provide access to many of the best business and professional opportunities. See *Fellowship and Philanthropy, The Men and Mission of the Salesmanship Club*, "D" Magazine 69 (Jan. 1983); *Lunch Bunch Liberated*, Houston City Magazine 8 (Sept. 1982); *Sexual discrimination in progressive Austin? Yep!*, Dallas Morning News, D-3 (Mar. 11, 1981); *Women legislators boycotting hotel*, Dallas Times Herald, A-1 (Feb. 12, 1981) (club barring woman legislator). In a society where rewards are determined by merit and not birth, it is a compelling interest of government to assure that business and professional opportunities are not denied because a person was born a woman and not a man.

Government prohibition of sexual discrimination in membership practices accords with First Amendment values and democratic decision-making. While the positions of the Jaycees may not change as a result of the admission of women, nonetheless the admission of woman plainly will make their debate more "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Moreover, given the important influence that associations such as the Jaycees have on decision-making in local communities throughout the nation, the admission of women will give them access to the debate that so often affects them. The

Jaycees may not be the Jaybirds, see *Terry v. Adams*, 345 U.S. 461 (1953), but it does not follow that government is powerless to open the Jaycees' doors to the participation of women.

IV. A PRACTICE OF SEXUAL DISCRIMINATION BY AN ASSOCIATION THAT PURSUES ACTIVE PARTICIPATION AND INFLUENCE IN THE COMMUNITY IS NOT PROTECTED PRIVACY.

Because an association is selective in membership, it does not follow that its practices, including its membership procedures and standards, are specially protected by the privacy aspect of the Due Process Clause of the Fourteenth Amendment. Were this not so, then antitrust regulation of the Washington Redskins and every other competent sports club would be subject to heightened judicial scrutiny. Rather, unless the association is family or otherwise an intimate group, government regulation of associational practices is subjected to traditional deferential scrutiny. See *Runyon v. McCrary*, 427 U.S. 160, 177-78 (1976); *Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); cf. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964); *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

A "careful respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrine of federalism and separation of powers have played," *Griswold v. Connecticut* 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment), counsel against any enlargement of Fourteenth Amendment protection for community associations that do not keep their activities secret but indeed

pursue active participation and influence in the community and its affairs.[8] The common law has long regulated the membership practices of associations. See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930) (discipline & expulsion); Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L. J. 175, 179-87 (1960) (discipline & expulsion). This has included particularly close regulation of membership admission practices of associations with significant power in the applicable community. See *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 655-56 (5th Cir. 1977); *Bunzel v. American Academy of Orthopaedic Surgeons*, 107 Cal. App. 3d 165, 165 Cal. R. 433 (C.A. 1980). The membership admission practices of associations have long been regulated by federal labor law, see *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and federal antitrust law, *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Ramsey Co. v. Associated Billposters*, 260 U.S. 501 (1923); *Associated Press v. United States*, 326 U.S. 1 (1945), cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781-92 (1975). See also *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978) (Title VI); *Runyon v. McCrary*, 427 U.S. 160 (1976) (42 U.S.C. § 1981).

Our basic values counsel against special protection for closed associations that have significant participation and influence in the community. Many of the associations that discriminate against women, here in Texas as well as elsewhere in the nation, are the places where important decisions are made affecting our communities and where important relationships are made affecting entry into business

[8] This applies as well to the law firm in *Hishon v. King & Spalding*, No. 82-940. Law firms in America by their very nature pursue active participation and influence in the community and its affairs.

and government. See authorities cited p. 10, *supra*. The exclusion of women from these associations excludes them from power and stigmatizes them as second-class business people and community leaders. We have long rebelled at concentrations of power that deny entry to the "outs" and reinforce the power of the "ins." These are not the kind of associations that warrant special protection.

Moreover, in our federal system, where state and local governments seek both to reinforce and supplement federal law, they should not be discouraged by special impediments. Minnesota's statute plainly reinforces and supplements Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. Further, Minnesota's statute importantly reinforces Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. See *Runyon v. McCrary*, 427 U.S. 160, 179 n.16 (1976) ("[t]he Court has recognized the link between equality of opportunity to obtain an education and equality of employment opportunity"). Without a statute like Minnesota's, even a prestigious M.B.A. or J.D. will not be a woman's ticket of admission to the places where her potential clients relax with, and grow confident in, their potential advisers, managers and lawyers.

CONCLUSION

For the above reasons, amici submit that a state law prohibiting sexual discrimination by an association such as the Jaycees does not violate associational rights of speech or privacy. We respectfully submit that the court of appeals' decision to the contrary should be reversed.

Respectfully submitted,

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